

9 June 2020

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: COVID-19 Recovery (Fast-track Consenting) Bill**

### **Purpose**

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1. We have considered whether the COVID-19 Recovery (Fast-track Consenting) Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have not yet received a final version of the Bill. This advice has been prepared with the latest version of the Bill (PCO 22822/5.0). We will provide you with further advice if the final version of the Bill includes amendments that affect the conclusions in this advice.
3. The purpose of the Bill is to urgently promote New Zealand's economic recovery from the COVID-19 pandemic by providing employment opportunities and certainty for ongoing investment while applying appropriate environmental safeguards. The Bill seeks to achieve this by expediting resource consenting and designation processes for infrastructure and development projects. The Bill also enables specific work on existing infrastructure to occur without the need for a resource consent.
4. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion, we have considered the consistency of the Bill with s 27(1) (the right to the observance of the principles of natural justice) and s 27(2) (the right to a judicial review of determinations) of the Bill of Rights Act. Our analysis is set out below.

### **The Bill**

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5. The Bill provides for Expert Consenting Panels ('panels') to be appointed to consider and determine applications for resource consents and notices of requirement for designations for certain eligible projects, replacing the role of local authorities under the Resource Management Act 1991 ('RMA'). The panels will follow a fast-track consideration process that offers a higher level of certainty than standard RMA processes that the consent or designation will be granted. The Bill lists Government-led projects that will automatically be referred to a panel for consideration. It also sets out a process by which the Minister for the Environment can recommend that other projects be referred to panels by Order in Council.
6. The Bill also provides that certain public infrastructure work does not require a resource consent under the RMA. This is limited to works undertaken by Waka Kōtahi New Zealand Transport Agency and KiwiRail to operate, replace, maintain and update certain existing infrastructure within the road and rail corridor or on land owned by the agencies. After the Bill is enacted, Kāinga Ora Homes and Communities and local authorities can be authorised by Order in Council to carry out other work on infrastructure without the need for a resource consent. The exemption is unavailable if certain exclusion criteria

apply, such as if the activity is a discretionary, non-complying or prohibited activity under a relevant RMA plan or proposed plan, or if it affects a wāhi tapu or other site of cultural or historical significance.

### **Section 27(1) - the right to the observance of the principles of natural justice**

7. Section 27(1) of the Bill of Rights Act affirms that every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
8. Clauses 13 to 20 of the Bill authorise panels to consider listed and referred projects and set out the process by which applications for the referral of non-listed projects to a panel are to be considered by the Minister. Schedule 6 outlines the fast-track procedure by which panels are to consider applications and notices of requirement. The fast-track procedure involves expedited timeframes, targeted rather than public consultation (cl 18 and 19), and limited appeal rights (cl 41). There is no requirement for a panel to hold a hearing (cl 20). Further, under cl 26 of the Bill, the need to obtain a resource consent under the RMA before undertaking certain works on existing public infrastructure is removed altogether. By bypassing the normal participatory requirements for consenting decisions under the RMA in these ways, the fast-track consenting and designation processes set out in the Bill could limit the right to natural justice.
9. Where a provision is found to pose a limit on a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is demonstrably justified in terms of s 5 of that Act. Following the guidance of the New Zealand Supreme Court in *Hansen v R*,<sup>1</sup> the s 5 inquiry may be summarised as:
  - a. Does the objective serve a purpose sufficiently important to justify some limitation of the right or freedom?
  - b. If so, then:
    - i. is the limit rationally connected with the objective?
    - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
    - iii. is the limit in due proportion to the importance of the objective?
10. The Bill's objective of urgently promoting New Zealand's economic recovery from the COVID-19 pandemic by providing employment opportunities and certainty for ongoing investment is self-evidently sufficiently important to justify some limit on the right to natural justice.
11. The ability to accelerate or avoid resource consenting and designation processes is rationally connected to this objective. An important part of the criteria by which projects have been and will be assessed as suitable for referral to a panel is their ability to help to achieve the purpose of the Bill, and a panel may decline a consent application or cancel a notice of requirement if it considers that the consent or designation would not meet the Bill's purpose.

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<sup>1</sup> [2007] NZSC 7

12. While the Bill overrides the participatory process in the RMA, it puts in place an alternative, targeted consultation process for listed and referred projects. A panel considering a resource consent application or notice of requirement must invite and consider comments from a list of stakeholders that includes iwi authorities, Treaty settlement entities, customary marine title groups, and protected customary rights groups. In relation to referred projects, a panel must also consult any other person referred to in the relevant referral order. Comments may also be invited from any other person the panel considers appropriate. The Minister is subject to natural justice obligations when considering an application to refer a project to a panel and may invite comment from any person.
13. We wish to draw particular attention to cl 25 of Sch 6, which sets out a process by which a panel can seek further information on a proposal before issuing a final decision. Clause 25(4) prohibits a person to whom further information obtained by the panel has been circulated from commenting on that information unless requested by the panel. We consider that the express prohibition in cl 25(4), while unusual, reflects a legitimate need to draw some limit on the opportunity for dialogue before a decision is made. The suggestion that a panel could request comment on further information if appropriate carries the implication that a person could request the opportunity to comment on further information and have that request considered by the panel in accordance with the requirements of natural justice.
14. We similarly consider that the exemption for certain public infrastructure activities from the usual requirement to obtain a resource consent is a reasonable limitation on the right to natural justice, noting the importance of the objective of the Bill and the limitations on the scope of the exemption described in para 6 above.
15. For these reasons, we consider that any limits within the Bill on the right to natural justice are justified under s 5 of the Bill of Rights Act.

### **Section 27(2) - the right to a judicial review of determinations**

16. Section 27(2) of the Bill of Rights Act provides that every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
17. The right to judicial review is intended to ensure that anyone with an interest in a decision can challenge the lawfulness of that decision. The phrase “in accordance with law” recognises that limits may be imposed on the power of judicial review, but “any attempt completely to deprive the High Court of its review powers would violate the guarantee”.<sup>2</sup>
18. Clause 43 of Sch 6 to the Bill requires a person who wishes to both appeal and apply for judicial review of a panel decision to file the appeal and the application at the same time. This prohibition amounts to a procedural restriction on the right to judicial review, and therefore prima facie limits s 27(2) of the Bill of Rights Act.
19. Requiring litigants to raise all objections to a panel’s decision at once promotes the Bill’s objectives by reducing the risk that a disaffected party could needlessly draw out the grant of a resource consent or designation by filing successive challenges to the same decision. We regard this limit on the use of judicial review as a proportionate means of

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<sup>2</sup> A Bill of Rights for New Zealand: A White Paper [1984-1985] | AJHR A6 at [10.175].

ensuring the efficiency of the resource consenting, designation and court processes. The limit does not substantively affect an individual's review rights and goes no further than is necessary to achieve its objective. Similar provisions, while uncommon, are not unheard of in New Zealand legislation.<sup>3</sup>

20. For these reasons, we consider that any limits within the Bill on the right to judicial review are justified under s 5 of the Bill of Rights Act.

## **Conclusion**

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21. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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<sup>3</sup> See for example Immigration Act 2009, s 149A; Local Government (Auckland Transitional Provisions) Act 2010, s 159.